IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 11, 2007 Session

IN RE: THE ADOPTION OF T.Z.T.

Appeal from the Chancery Court for Lawrence County
No. 12657-05 Robert L. Holloway, Chancellor

No. M2007-00273-COA-R3-PT - Filed November 15, 2007

Maternal grandparents of a two-year-old girl filed a Petition for Adoption seeking to terminate the parental rights of the child's Father and Mother on the ground of abandonment. The trial court found there was not clear and convincing evidence that Father abandoned his child because his failures to support and to visit the child were not willful. Accordingly, the trial court did not terminate Father's parental rights and dismissed the Petition for Adoption. The grandparents appeal. We affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which ROBERT S. BRANDT, SP.J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

Randy Hillhouse, Lawrenceburg, Tennessee, for the appellants, M.D. B. and B. M. B.

M. Wallace Coleman, Jr., Lawrenceburg, Tennessee, for the appellee, C. E. T.

OPINION

Maternal grandparents appeal the trial court's dismissal of their Petition for Adoption of their two-year-old granddaughter, T.Z.T., after declining to terminate Father's parental rights. Grandparents allege the trial court erred in finding that Father's failure to visit and failure to support were not willful and in finding that it was not in the child's best interests to terminate Father's parental rights.

I. FACTUAL BACKGROUND

On February 18, 2005, T.Z.T. was born in Litchfield, Illinois to unmarried parents C.E.T. ("Father") and J.L.B. ("Mother"). Father and Mother had been involved in a sporadic and tumultuous relationship since 2002, continuing in an on-again, off-again status through as late as

August 2006. Father and Mother have another daughter together who is approximately one year older than T.Z.T. and who currently lives with Mother in Litchfield, IL.[1]

Soon after T.Z.T. was born, it became clear that Mother was having a difficult time caring for the two young children. Although Father and Mother were apparently together when T.Z.T. was born, it did not take long before they were "off-again." When T.Z.T. was about six weeks old, Mother stated that she "just couldn't handle it anymore" and took both the children to visit her parents in Lawrenceburg, Tennessee. Father was unaware that Mother had taken the children to Tennessee until several days after they left Illinois. It was his understanding that they would be away for a few weeks while Mother's parents ("Grandparents") helped her adjust. However, T.Z.T. has remained in the home and care of Grandparents since that time.[2] Father did not see his daughter, whether in Illinois or in Tennessee, for the next several months.

Grandparents filed a Petition for Adoption on October 7, 2005 alleging as grounds for the termination of parental rights that both Mother and Father abandoned T.Z.T. and consented to the adoption. Father responded on his own behalf filing a *pro se* Answer on October 21, 2005 denying Grandparent's allegations that he consented to the adoption and had abandoned his daughter. Specifically, Father claimed that any failure to visit T.Z.T. was because he was informed that he is not welcome at Grandparents' residence "where his daughter has been against his wishes." Father also claimed that, when T.Z.T. is brought to visit Mother in Illinois, he is not allowed on Mother's property and is not informed that his daughter is in the state. Father also stated in his *pro se* Answer that he was coming to court in Tennessee with the hope that he be given custody of his biological child, T.Z.T.

The adoption matter was set for trial on March 14, 2006. Neither Father nor Mother appeared. Upon their failure to appear, the trial court issued a Final Decree of Adoption on March 29, 2006, finding that it was in T.Z.T.'s best interest to grant the adoption and to terminate the parental rights of Father and Mother. After receiving the Final Decree of Adoption, Father obtained local counsel and timely filed a motion to set aside the judgment claiming he never received notice of the trial date. The trial court set aside the Final Decree of Adoption on August 11, 2006 and, in doing so, held that the best interests of the child dictated that T.Z.T. remain in the custody and care of Grandparents pending further orders from the court.

The new trial on termination of parental rights was held on January 9, 2007. Both Father and Mother were present at this hearing and offered testimony in addition to witnesses called by Grandparents and Father, including T.Z.T.'s paternal grandmother. In an order dated January 17,

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[1] The parental rights as to T.Z.T.'s sister are not at issue in this matter.

[2] There are conflicting accounts in the record about the exact date on which T.Z.T. officially moved in with Grandparents with some indication she returned to Illinois with Mother and sister for one week before being sent back to Tennessee permanently. There is no clear evidence Father saw the child during this time so, for the purposes of our analysis, T.Z.T. has essentially remained with Grandparents since the end of March 2005, when she was approximately six weeks old.

2007, the trial court made a number of specific factual findings[3] and ultimately declined to terminate Father's parental rights, thereby dismissing Grandparent's Petition for Adoption. Grandparents appeal.

II. TERMINATION OF PARENTAL RIGHTS

It is well-settled that biological parents have a constitutionally-protected, fundamental right to the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *see also In re Drinnon*, 776 S.W.2d 96, 97 (Tenn.Ct.App.1989); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn.1993). Although this right is fundamental, it is not absolute and the state may interfere with parental rights upon showing a compelling state interest. *Santosky*, 455 U.S. at 747. However, both the federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away. *Stanley v. Illinois*, 405 U.S. 645, 658-59, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Swanson*, 2 S.W.3d 180, 188 (Tenn.1999). Tennessee has adopted a statutory basis for determining when the state, through court action, may interfere with parental rights by terminating them completely. Because the parent-child relationship is afforded pronounced constitutional protections, adoption proceedings must "contain safeguards against unwarranted termination or interference with a biological parent's parental rights." *O'Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn.Ct.App.1995), *superseded by statute on other grounds*.

The termination of one's rights as a parent is one of the most serious tasks relegated to the courts due to the finality of the act, for "[a]n order terminating parental rights shall have the effect of *severing forever all legal rights and obligations* of the parent[.]" Tenn. Code Ann. § 36-1-113(*l*)(1) (emphasis added). In Tennessee, a court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground for termination and (2) that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn.2002).

Because of the finality of these decisions, parties seeking to terminate parental rights are held to a heightened burden of proof and must prove one or more of the statutorily defined grounds for termination by clear and convincing evidence.[4] Tenn. Code Ann. § 36-1-113(c)(1). In order to be clear and convincing, the evidence must be of the type "in which there is no serious or substantial doubt about the correctness of the conclusions drawn" therefrom. *In re Valentine*, 79 S.W.3d at 546 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn.1992)); *see also O'Daniel*, 905 S.W.2d at 188. "The use of a heightened standard reflects the importance of the public and private

[3] In actions for the termination of parental rights, Tenn. Code Ann. § 36-1-113(k) requires the court to "enter an order that makes specific findings of fact and conclusions of law within thirty (30) days of the conclusion of the hearing."

[4] The grounds for terminating parental rights are enumerated in Tenn. Code Ann. § 36-1-113(g).

interests affected by an adoption" and should invoke in the fact-finder's mind a firm belief or conviction as to the truth of the allegations sought to be proved. *O'Daniel*, 905 S.W.2d at 187, 188 (citations omitted).

III. ABANDONMENT

We note that the only issues presented for this court's consideration are those concerning the termination of Father's parental rights; no other matters concerning custody, visitation, or support were raised in the trial court.

The only statutory ground at issue in this case is abandonment.[5] A court may terminate a parent's right to his or her children when that parent has abandoned the child as defined in Tennessee Code Annotated § 36-1-102. Tenn. Code Ann. § 36-1-113(g)(1). The definition of abandonment as pled in this case is:

> For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(i).

An essential element of this definition of abandonment is the willfulness of a parent's conduct. "Willful conduct consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent." *In re Audrey S.*, 182 S.W.3d 838, 863 (Tenn. Ct. App. 2005) (citing *In re Mazzeo*, 131 F.3d 295, 299 (2d Cir.1997)). A parent's failure to visit or support a child is deemed "willful" when that parent knows he or she has a duty to visit or support, has the ability to visit or support, makes no attempt to visit or support, and has no justifiable excuse for not visiting or supporting the child. *In re Audrey S.*, 182 S.W.3d at 864 (citing *In re M.J.B.*, 140 S.W.3d 643, 654 (Tenn. Ct. App. 2004) (footnote omitted)). Nonetheless, there can be no finding of willful abandonment in cases where the parent has attempted visitation but was thwarted in those efforts by the acts of third parties. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn.2007); *In re D.A.H.*, 142 S.W.3d 267, 277 (Tenn.2004).

We first address Grandparents' argument that Father's failure to visit T.Z.T. was in fact willful. It is undisputed that Father did not see or visit with T.Z.T. for at least four consecutive

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[5] In their brief, Grandparents allege that Father's failure to establish paternity of or to legitimize T.Z.T. triggers an additional ground on which to terminate his parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(9)(A). Because Grandparents did not specifically allege this ground in their Petition for Adoption or argue the point in the trial court, the trial court did not have an opportunity to address the merits of this claim, and we decline to do so on appeal.

months prior to Grandparents' action for adoption. However, the details surrounding and reasons for Father's limited visitation were the subject of much conflicting testimony from the parties. Father maintains he visited with T.Z.T. on at least one occasion since she has lived in Tennessee. Mother on the other hand directly disputed Father's claims stating that she could not remember a single time when Father saw T.Z.T. after she was living with Grandparents. Mother stated she took T.Z.T. to Father's house where she visited with her grandmother but Father was not there. Mother did not say, however, that she told Father she was coming or that he knew his daughter would be at his house. Mother further testified that she visits with Grandparents and, thus, with T.Z.T. at least once a month, sometimes more.

As to Father's notice of and opportunity for visitation, Grandmother testified that Father was invited to visit with T.Z.T. over Thanksgiving and just did not show up, but then admitted she never called Father to tell him if and when she was going to be in town. Father's mother, T.Z.T.'s paternal grandmother, testified that after T.Z.T. was taken to Tennessee to live with Grandparents, she only visited with her granddaughter a few times. Like Father, his mother would generally learn from other sources that Grandmother brought T.Z.T. to Illinois to visit Mother after they had already left the state and returned to Tennessee. Father was not present on the few occasions when his mother was able to see her granddaughter in Illinois.

The parties agree Father visited with T.Z.T. and her sister after the August 11, 2006 court date in Lawrenceburg. This was the first time Father had seen his daughter since December 2005. In response to questions regarding opportunity for visitation in Tennessee, Father testified that he and Grandparents "don't get along enough to come down and just go to her house and visit." The situation is further complicated by the fact that Father does not own a vehicle. Father's mother attested that Father was a good father to his oldest daughter but that the geographical distance between Illinois and Tennessee prevented him from being a good father to T.Z.T. She and her husband are willing to provide transportation to and from Tennessee to help facilitate Father's visitation.

In his order denying termination of rights, the trial court specifically found the following facts as related to Father's visitation:

> 10. [Father] testified that he became aware that [T.Z.T.] had been taken to Tennessee approximately two (2) days after [Mother] left Illinois. When he discussed it with her, [Mother] said that she was going to stay a while with her parents. [Father] testified that he did not get along with [Mother's] parents. [Father] asked [Mother] to see his daughter, but he has not been able to visit since she was moved to Tennessee.
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> 11. On occasions when [T.Z.T.] has been brought to Illinois, she has visited with [Father's] brother and his mother, but not with [Father]. . . .

> 19. [Father] has failed to visit with his child for a period of four (4) consecutive months immediately proceeding [sic] the filing of the petition. . . .
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> 21. There is not clear and convincing proof that [Father's] failure to visit with [T.Z.T.] for the four (4) consecutive months immediately proceeding [sic] the filing of the petition was willful. The child was removed from Illinois and placed with the maternal grandparents with whom [Father] did not get along. [Mother] obstructed, or at best did not foster, visitation with [Father]. . . .

The willfulness of specific conduct depends on a person's intent, which understandably is difficult to ascertain because of the private nature of another's thoughts or motivations. *In re Audrey S.*, 182 S.W.3d at 864. Consequently, a person's intent is often inferred from circumstantial evidence and thus, the witnesses' demeanor and credibility play an important role in determining intent. *In re Audrey S.*, 182 S.W.3d at 864.

The demeanor and credibility of witnesses are best assessed by the trial court in non-jury cases. *See Bowman v. Bowman*, 836 S.W.2d 563, 567 (Tenn.Ct.App.1991). "When a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to the trial court's factual findings." *In re L.S.S.*, No. E2006-01989-COA-R3-PT, 2007 WL 749629, *3 (Tenn.Ct.App. Mar. 13, 2007) (citing *Seals v. England/Corsair Upholstery Mfg. Co., Inc.*, 984 S.W.2d 912, 915 (Tenn.1999)). In fact, "[o]n an issue which hinges on the credibility of witnesses, the trial court will not be reversed unless there is found in the record clear, concrete, and convincing evidence other than the oral testimony of witnesses which contradict the trial court's findings." *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn.Ct.App.1990) (citing *Tennessee Valley Kaolin Corp. v. Perry*, 526 S.W.2d 488, 490 (Tenn.Ct.App.1974)).

The evidence in the record supports the trial court's conclusions that Mother and Grandparents impeded Father's visitation and access to T.Z.T. The "[f]ailure to visit or to support is not excused by another person's conduct unless the conduct actually prevents the person with the obligation from performing his or her duty or amounts to a significant restraint of or interference with the parent's efforts to support or develop a relationship with the child." *In re Audrey S.*, 182 S.W.3d at 864 (internal citations omitted).

We agree with the trial court's implicit finding that the conduct of Mother and her parents significantly interfered with Father's ability to support and to develop a relationship with his daughter. *See In re Audrey S.*, 182 S.W.3d at 864 n.34 (noting examples of conduct amounting to significant interference with or restraint of a parent's efforts to include blocking access to the child, keeping the child's whereabouts unknown, or vigorously resisting a parent's efforts to visit).

Tennessee Code Annotated § 36-1-102(1)(D) defines a 'willful failure to support' one's child as "the willful failure, for a period of four (4) consecutive months, to provide monetary support or the willful failure to provide more than token payments toward the support of the child[.]" Again, the language of the statute requires an assessment of Father's intent to determine the willfulness of Father's actions regarding support. We have previously stated that terminating parental rights based on a failure to support presupposes that the parent is aware of his or her duty to support, has the ability to provide support, and has voluntarily and intentionally chosen not to provide support without a justifiable excuse. *In re M.J.B.*, 140 S.W.3d at 654 (citing *In re Adoption of Muir*, No. M2002-02963-COA-R3-CV, 2003 WL 22734524, *5 (Tenn.Ct.App. Nov. 25, 2003) (no Tenn.R.App.P. 11 application filed)).

With respect to Father's failure to support, the trial court made the following findings:

> 20. [Father] has failed to provide support for his child for the four (4) consecutive months immediately proceeding [sic] the filing of the petition. . . . .
> 22. There is not clear and convincing proof that the failure to pay support was willful. [Father] pays support on the other child, albeit he is in arrears, and he is agreeable to paying support for [T.Z.T.]. . . .

Again, it is undisputed that Father did not pay or provide support of any kind for well over four consecutive months while T.Z.T. was in Grandparents' care. Father vigorously maintains that the reason he did not provide support for T.Z.T. is because he was never asked to provide support for T.Z.T. Grandmother confirmed this testimony stating that she has never asked Father for support.

Father is currently under court order to pay child support for his oldest daughter and owed over $2,600.00 in arrears at the time of trial. In fact, Father has been in contempt of court on at least two occasions for violating his support obligations and was imprisoned briefly for the same. Nevertheless, Father continues to make payments, and Father's mother testified to helping her son comply by personally handling his paychecks and mailing in his support obligations from those monies.

Father does obtain fairly regular employment in the construction industry, although much of the work is seasonal. As a result, he is laid off for the winter months and typically resumes employment during the warmer months when able to work outdoors. Father was laid off work in November 2006 prior to the hearing and was drawing unemployment at the time of trial. Father's annual income averages somewhere between ten thousand ($10,000.00) and fifteen thousand ($15,000.00) dollars per year. Obviously, his income is limited, but we cannot say that he has no ability to pay some child support for T.Z.T.

However, as stated earlier, Grandparents and Father did not get along in any sense of the word. All communication from either party went through Mother. The record indicates that Mother did not communicate Father's requests to see T.Z.T. to Grandparents. There is no evidence suggesting Mother or Grandparents ever asked Father for support, whether directly or indirectly.

Father and paternal grandmother both explained they did not understand why Father should be expected to send support when he wanted custody of, or at least the opportunity to take care of, T.Z.T. Visitation is not tied to support, and Father's inability to see his child does not excuse his legal obligation to provide support. However, the question is not whether he had a duty to support, but whether his failure to provide support was willful.

Father clearly wanted his daughter back in Illinois. As evidenced by his *pro se* Answer, Father did not consent to Mother placing T.Z.T. in Grandparent's permanent care. He has maintained throughout a desire to have either custody of or visitation with T.Z.T. Father testified that he wanted to come to Tennessee and take T.Z.T. from Grandparents but was informed that the laws of the State of Tennessee would not allow this action. We find that the animosity between Grandparents and Father and the interference with Father's access to his daughter are sufficient to support the trial court's finding that willfulness was not established by clear and convincing evidence. Father did express a present willingness and ability to provide support for his daughter. We affirm the trial court's finding that Grandparents did not meet their burden proving that Father's failure to support was willful.

IV. BEST INTERESTS OF THE CHILD

Because we conclude that Grandparents did not meet their burden of proving by clear and convincing evidence the existence of grounds warranting the termination of Father's parental rights, it is unnecessary for us to reach the best interests analysis. *See* Tenn. Code Ann. § 36-1-113(c) (2007); *In re D.L.B.*, 118 S.W.3d 360, 368 (Tenn.2003). Although the trial court reached the same conclusion, it nevertheless made findings related to the best interests of the child and determined that it was not in T.Z.T.'s best interest to terminate Father's parental rights based on the following:

> (a) that [Father] and [Mother] have another child which is T.Z.T's sister. No one has sought to terminate the parental rights of this child.
> (b) [Mother] only wants her parental rights terminated if [Father's] parental rights are terminated. [Mother] testified that her relationship with the child would remain the same if]Father's] rights are terminated.
> (c) The maternal grandparents testified that they would still refer to themselves as grandparents and [Mother] as the mother. . . .

Based on the testimony and the above findings of fact, the trial court concluded that the Grandparents' action to terminate Father's parental rights was basically a plan to remove Father from the life of T.Z.T. while maintaining the mother/daughter relationship with Mother. Grandparents appeal the trial court's determination on best interests.

In considering whether the termination of parental rights would be in the best interests of a child, the court is bound to consider a number of factors established by statute.[6] No single factor is dispositive in determining the child's best interests, and the court may consider any additional factors when making this determination. *See* Tenn. Code Ann. § 36-1-113(I). In doing so, the child's best interests must be viewed from the child's perspective, not from the parent's. *White v. Moody*, 171 S.W.3d 187, 194 (Tenn.Ct.App.2004) (citing *In re Hammett*, No. 245221, 2003 WL 22416515, at *2 (Mich.Ct.App. Oct. 23, 2003)).

Grandparents' overriding motivation in seeking to adopt T.Z.T., instead of simply retaining physical custody of her, concerns insurance. About a week after Mother brought T.Z.T. to Grandparents' home, she contracted a respiratory virus requiring brief hospitalization. T.Z.T.'s respiratory problems remain even though she will eventually get over the initial virus. In the meantime, her treatment includes fairly regular use of a nebulizer machine. The medicine used to treat T.Z.T.'s respiratory infections costs on average $170.00 every two to four weeks. Grandparents currently pay all of these expenses out of pocket.

If Grandparents were able to adopt T.Z.T., they would be able to add her to their major medical insurance. Grandmother admits they can obtain separate coverage for her needs; Grandparents simply cannot add her as a dependent to their existing family plan without adopting her. However, if Father's rights are not terminated, he and Mother are primarily responsible for medical costs for their child. There was no proof of other avenues for health care cost assistance in view of Father's limited income. We recognize that the cost of healthcare can be enormous, and while insurance coverage is not an insignificant benefit, it is but one of many factors to consider. Neither Mother nor Grandparents have asked Father for assistance in paying T.Z.T.'s medical expenses, and there is evidence suggesting they have not even informed him of his daughter's condition. In any event, the inability to pay medical bills or to provide insurance is not, in and of itself, a sufficient basis for terminating a parent's rights.

Father's mother, Father's brother and sister-in-law, and others in Father's family have been able to develop a relationship with T.Z.T. Aside from these relatives, the more significant relationship to be affected is that between T.Z.T. and her sister. Father regularly spends time with his oldest daughter and she has a strong relationship with her "sissy."

We believe Mother's testimony supports the trial court's conclusions as to this effort to remove Father from T.Z.T.'s life. When asked why she thinks it is in T.Z.T.'s best interests to stay with Grandparents, she says because "[t]hey're the only parents that she's known. I mean, she knows me, but it's different with my parents because they've had her since she was six weeks old." It is true that Grandparents appear to be the only real parental figures in T.Z.T.'s life. However, Mother created this situation by secretly sending the child to live in Tennessee without Father's knowledge. She aggravated the situation by impeding and certainly not fostering Father's visitation with his

[6] Tenn. Code Ann. § 36-1-113(i) lists the factors to be considered in a "best interests" analysis.

daughter. And, as she acknowledges, Mother's situation and relationship with T.Z.T. remains and will continue to remain unchanged, regardless of whether her rights are terminated.

What is clear from the record is that T.Z.T. is a happy, well-adjusted child with a stable home life as provided by Grandparents. Grandparents have formed a bond with the child and have been T.Z.T.'s sole providers. It is clear that Grandparents love this child and have generously cared for her. We have no doubt they want what they believe is best for T.Z.T. However, they have not met the burden of proof necessary to terminate forever Father's constitutionally-protected relationship with his child.

V. CONCLUSION

Because the only issues presented for our consideration concern the termination of Father's parental rights, we do not address matters concerning the custody, visitation, or support of this child. Those matters should be addressed expeditiously by the trial court. Finding no error below, we therefore affirm the judgment of the trial court in all respects. Costs of this appeal are assessed against the Appellants/Grandparents and their surety, for whom execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE